

§ 779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, farm implements, trailers, boats, or aircraft. Section 13(b)(10)(A) states that the provisions of section 7 shall not apply with respect to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” Section 13(b)(10)(B) states that the provisions of section 7 shall not apply with respect to “any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.” This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling automobiles, trucks, or farm implements to the ultimate purchaser for section 13(b)(10)(A) to apply. If these tests are met by an establishment the exemption will be available for salesmen, partsmen and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. Likewise, the establishment must be primarily engaged in the business of selling trailers, boats, or aircraft to the ultimate purchaser for the section 13(b)(10)(B) exemption to be available for salesmen employed by the establishment who are primarily engaged during the work week in selling these named items. An explanation of

the term “employed by” is contained in §§ 779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships that qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm implements, but also includes dealers in trailers, boats, and aircraft.

(c) *Salesman, partsman, or mechanic.*

(1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee’s own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation,

as an automobile, truck, or farm implement. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishments annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

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OTHER ESTABLISHMENTS FOR WHICH
SPECIAL EXCEPTIONS OR EXEMPTIONS
ARE PROVIDED

§ 779.381 Establishments within special exceptions or exemptions.

(a) As stated in § 779.338, the special exceptions provided in the 1961 amendments for hotels, motels, restaurants, hospitals, institutions for the sick, the aged, the mentally ill or defective, and schools for physically or mentally handicapped or gifted children have been removed. Seasonally operated amusement or recreational establishments and motion picture theaters also no longer are specifically exempt under section 13(a)(2), but have specific exemptions set out for them in sections 13(a)(3) and 13(a)(9) of the Act as amended in 1966.

(b) Hotels, motels, and restaurants continue to be eligible for exemption under section 13(a)(2), but must meet all the requirements of that section for exemption in the same manner as other retail or service establishments. However, a special overtime exemption is

provided for such establishments, regardless of size, in the first part of section 13(b)(8). Hospitals, residential care establishments, and schools for physically or mentally handicapped or gifted children are specifically excluded by the Act from consideration for exemption under section 13(a)(2); however, residential care establishments are exempt from the overtime pay requirements of the Act under the second part of section 13(b)(8) as long as overtime premium of not less than one and one-half times the employee's regular rate of pay is paid to him for time worked in excess of 48 hours in the workweek. In addition, section 7(j) of the amended Act provides a special overtime arrangement for hospital employees whereby overtime pay is due an employee after 8 hours in a day or 80 hours in a 14-day work period rather than on the basis of the 7-day workweek as is normally required by the Act. This provision, though, requires an agreement or understanding on the part of both the employer and the employee prior to the performance of the work. See § 778.601 of this chapter.

(c) The amendments of 1966 also repealed the exemption from both the minimum wage and overtime pay provisions which was in the Act for certain food service employees employed by retail or service establishments that were not exempt under section 13(a)(2). This exemption (formerly found in section 13(a)(20) is now an exemption from the overtime provisions only and is set out in section 13(b)(18). Those establishments now excluded by the Act from consideration for exemption under section 13(a)(2) (hospitals, residential care establishments, etc.) may utilize this exemption where they meet the Act's definition of retail or service establishment in the last sentence of section 13(a)(2) and the conditions set out in section 13(b)(18). Likewise, the special exemption for any employee of a retail or service establishment primarily engaged in the business of selling automobiles, trucks, or farm implements was repealed by the 1966 amendments. In its stead the overtime exemption set out in section 13(b)(10) and previously discussed in § 779.372 was provided for certain employees of any